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In The
Supreme Court of the United States
October Term, 1988

YONKERS RACING CORPORATION,

Petitioner,

v.

THE CITY OF YONKERS,

Respondent,

and

UNITED STATES OF AMERICA and YONKERS BRANCH, NAACP, ET AL.,

Intervenor-Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF YONKERS BRANCH, NAACP, et al.

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1. STATEMENT OF THE CASE

This is a matter related to United States and Yonkers Branch, NAACP, et al., vs. Yonkers Board of Education, et al., 80 CIV 6761 (S.D.N.Y.) currently before this Court on the petitions for writs of certiorari by four members of the Yonkers City Council and the City of Yonkers. This Court previously rejected the City of Yonkers' petition for a writ of certiorari to review underlying liability and remedy issues. 108 S.Ct. 198 (June 13, 1988).

In November 1985, after a ninety two day bench trial, the district court, Sand, J., ruled that the City of Yonkers had engaged in generations of racial segregation, excluding minorities persons from East Yonkers

neighborhoods. 624 F.Supp. 1275 (S.D.N.Y. 1985). After a remedy hearing, the district court ordered, *inter alia,* Yonkers to submit sites for the construction (with federal funds) of 200 units of public housing. 535 F.Supp. 1588 (S.D.N.Y. 1986) [In 1980 and again in 1982 Yonkers had promised HUD, as a condition of receiving federal Community Development Block Grant assistance, that it would construct 200 assisted housing units when federal funds for that purpose became available.]

Yonkers failed to submit appropriate sites to HUD or to the district court and the housing remedy process stalled. Finally, with the strong affirmance of the district court's liability decision by the United States Court of Appeals for the Second Circuit, 837 F.2d 1181 (1987) on January 27, 1988, the City Council agreed to enter into a Consent Decree with the plaintiff, United States, and the plaintiffs-intervenor, Yonkers Branch, NAACP, et al. The Decree located 200 units of public housing on seven sites in East Yonkers, including a parcel on Clark and Loring Streets owned by petitioner.

All the parcels listed in the Consent Decree had, prior to their inclusion, been the subject of considerable inquiry and study. Each had been identified as appropriate for public housing by the Outside Housing Advisor, a court-appointed advisor expert in urban planning and the location of assisted housing. After the selection of these sites, the federal funding agency, HUD, conducted a review to insure that each met federal standards governing the placement of public housing. Such a review evaluates (a) the probability that any such new housing will exacerbate current conditions of racial segregation [clearly not an issue in the overwhelmingly white neighborhood involved here]; (b) the proximity of the site to standard amenities, i.e., transportation; shopping, etc. and (c) the environmental

suitability of the site for residents of public housing, i.e., noise studies; review of any possible toxic waste conditions on site; contiguity to hazardous conditions, etc.

In addition, by late January 1988, the parties in *United States v. Yonkers,* had all been provided opportunity to comment on the attributes of petitioner's parcel. Each concluded that it was an appropriate site. HUD also had given preliminary approval and the Consent Decree conditioned ultimate acceptance of this site on its passing more rigorous HUD review. After entry of the Decree, HUD reaffirmed its conclusion that the site met all relevant federal standards and authorized its inclusion in a Request for Proposals (issued in early December 1988) from developers. *See generally,* 24 C.F.R. sec. 941.202 (1988).

The Decree required Yonkers to first seek to negotiate a purchase price with each respective property owner.[1] Failing agreement with the titleholder on price within forty-five days, the City was to initiate eminent domain proceedings in State Supreme Court to acquire title to the subject properties at an established price. Under state law, title to the disputed property would pass to the City upon the acceptance by the State Supreme court of the petition initiating eminent domain, and would not be delayed until the determination of just compensation. Acceptance of the petition would occur after the State Supreme Court determined that the condemnor had complied with the requisites of state law or been excused from such compliance.

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1. Of the seven sites included in the Consent Decree, four were privately-held and three were City-owned parcels.

Failing to reach agreement with petitioner on a purchase price, the City failed to timely initiate eminent domain proceedings. Under further threat of contempt of court, Yonkers reluctantly initiated the required proceedings and petitioner then raised two affirmative defenses: that the City had failed to (a) follow the explicit notice and hearing provisions of the State's Eminent Domain statute and (b) comply with the terms of the State Environmental Review Act (SEQRA).[2]

On May 27, 1988, the NAACP orally moved the district for an order compelling the respondent in the Article 78 proceeding, the City of Yonkers, to remove that action to federal court.[3] The NAACP so moved because the City of Yonkers was then opposing, in every way possible, implementation of the January 28, 1988 Consent Decree and it did not believe that the City could be trusted to pro-

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2. In its petition filed on April 25, 1988, the City claimed exemption from the notice and review requirements of the EDPL on the basis of the "emergency" provisions of that statute. EDPL sec. 206(d). Petitioner has not included this petition in the appendix.

3. Petitioner erroneously states that the United States initiated this action. The United States sought removal of the similar Article 78 proceeding initiated by the Archdiocese of New York and objecting to the taking of the so-called Seminary site on Valentine Avenue. At the end of the May 27, 1988 hearing on that motion, counsel for the City of Yonkers informed the court of the pendency of the Raceway's similar Article 78 proceeding. Thereafter, counsel for the NAACP, previously unaware of that action's existence, moved for an order compelling Yonkers to remove that action. The district court granted that motion.

perly defend that Decree in state court. 18a.[4]

Contrary to the Raceway's statement of the case, the motion to remove was not predicated either upon a concern with petitioner's desire to exercise its due process rights or any intent to impede its challenges to the eminent domain petition.[5] Rather, the movant's central concern

4. By that date, the City had filed two motions, the first to modify the Consent Decree by striking Section 10 which prohibited it from seeking further review of its underlying obligation to provide sites for and permit the erection of the 200 units of public housing and the second to vacate the entire decree on the ground of change in circumstance—the support of John Cardinal O'Connor was allegedly integral to the City Council's willingness to enter into the Decree in the first place and His Eminency was now attacking the Decree as "fatally flawed." While the district court denied both motions, both the United States and the NAACP believed the City would take any actions possible to defeat implementation of the court orders, a view confirmed by the lengthy contempt of court struggle which gained national attention a few short months later. As the Court of Appeals noted, "Despite the City's assurance through its counsel that it would vigorously defend against the Article 78 petitioners, we have serious doubts that a reluctant condemnor, which at every opportunity has resisted implementation of the Housing Remedy Order could be counted on in state court to adequately protect the integrity of the Consent Decree. To believe otherwise would be to ignore the fact that Yonkers entered into the Consent Decree and instituted the condemnation proceedings only after being threatened by the district court with sanctions for contempt. "One must realistically deal with the fact," Judge Sand explained, "the positions which the City would be compelled to take in [state court] would be significantly contrary to the positions taken by [it] in [the district] court." The inconsistency of these positions convinces us, therefore, of the necessity to exercise removal jurisdiction to prevent frustration of the Housing Remedy Order." 18A

5. Petitioner speculates that "the order under the All Writs Act was issued to the *City, not the Raceway*" because "the United States wanted to find some way around the fact that the City could not remove the proceedings, not that the Raceway was in any way acting inconsistently with the Consent Decree." (Brief at 15). In fact, the order was issued against Yonkers because as a respondent in the state court proceeding, it had the right to initiate removal and, due to the city's opposition to implementation of the Consent Decree, the NAACP believed it had to be required to remove to protect the integrity of that agreement. The district court and the Court of Appeals both agreed with that reasoning.

was that these issues be litigated in the same forum which had approved a Consent Decree entered to remedy adjudicated constitutional violations. Indeed, the Raceway's due process right to a day in court were entirely preserved, though, concededly its choice of forum was altered by the district court's grant of the NAACP's motion to order the City of Yonkers to remove the Article 78 petition from state to federal court.

The district court rejected the Raceway's suggestion that its Article 78 petition concerned no matter of federal law. Instead, it held that the outcome of that proceeding, and even the time taken to resolve it, clearly jeopradized the implementation of the housing remedy order, entered to vindicate the rights of members of plaintiff-intervenor' class.[6] Moreover, the district court believed that its interpretation of the Consent Decree, including the provision requiring the City to initiate eminent domain proceedings, should supersede that given by a state court.

The district court ordered Yonkers to remove the Article 78 proceeding (in which it was respondent) and proceeded to decide the issues raised therein on the merits. The court found that the requirements of the Eminent Domain Procedure Law were inapplicable where a federal

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6. Permitting the matter to remain in state court would cede control over the pace of implementation of the housing remedy to that forum, clearly inconsistent with the obligation of a federal court to insure the expeditious vindication of constitutional rights. In fact, to date, the State Supreme Court has not approved any of the condemnation petitions filed by Yonkers in April 1988, causing the district court to deem title to be transferred so as to allow the Request for Proposals to issue. This became necessary when HUD advised that it could not approve the issuance and publication of an RFP until the municipality had title to the property upon which construction of public housing was contemplated.

court had already determined that the taking in question served a critical public purpose and that the subject property was suitable for the end. Alternatively, the district court found that the imperative of relieving the unconstitutional condition constituted an emergency which more than justified Yonkers' failure to go through a notice and review process, the results of which had already been pre-determined by the entry of the Consent Decree in federal court. Indeed, Yonkers' obligation to take this property arose by dint of federal court order; local procedures could not affect that requirement and following them would simply waste time and energy, not advance justice. Moreover, the district court found that SEQRA specifically exempted from its coverage municipal actions taken pursuant to litigation, as was clearly the case here.

By decision of September 22, 1988, the United States Court of Appeals for the Second Circuit affirmed the district court's denial of petitioner's Motion to Remand and its ruling on the merits of the Article 78 proceeding.

In November 1988, this Court denied the petitioner's application for a stay. Thereafter, to allow for the issuance of a Request for Proposals to build low income housing on this site, among others, the district court found it necessary to deem its title to have passed to the City of Yonkers due to the continued pendency in the state court of the City's eminent domain proceeding.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

a. THE DISTRICT COURT PROPERLY REMOVED THIS MATTER

The Raceway submits that the district court lacked subject matter jurisdiction.[7] This argument depends on the artificial separation which petitioner draws between the subject matter of this suit and the vindication of federal constitutional rights stemming from the underlying civil rights lawsuit. This suggestion is illogical in the extreme.

Assuming that the district court could have required that the City initiate all eminent domain procedings in its court to insure both the expeditious determination of any such action and its efficacy, the Raceway offers no explanation of why, in light of the clear prospect of delay in resolving its Article 78 action in another forum, the district court was without the authority to require removal of that action under the authority granted by the All Writs Act.

The Raceway provides no citation to any like situation where a federal court with a need to remove a state action so as to properly exercise and discharge its jurisdiction over an underlying federal case has been prevented from so proceeding. Instead, where state proceedings

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7. Contrary to petitioner's suggestion, the Court of Appeals did not decide the question of whether the removal statute on its own terms would have justified removal here. Instead, finding an alternative ground for removal in the All Writs Act, the Second Circuit did not resolve "this difficult question." 14a.

stand as an impediment to the fulfillment of civil rights, federal constitutional interests prevail. *Swann v. Charlotte-Mecklenburg Board of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974); *North Carolina State Board of Educ. v. Swann*, 402 U.S. 43, 45 (1971).

No party here argues that the Raceway's claim that the instant taking violates certain state statutory rights independently raises a federal claim. Nor has any party asserted that because of the existence of the Consent Decree the Raceway should be disabled from "asserting its rights under state law." *Cf.*, Brief at 14. What is contended, however, is that resolution of its state law claims, integrally related to the federal action, is properly achieved in the federal court which entered the underlying order -that requiring the taking of the property to vindicate federal constitutional rights.

Moreover, this case provides no occasion for petitioner's complaint as to the "radical expansion" of the federal court's jurisdiction. The very state court action it initiated only arose because the federal court did not insist on the initiation of the eminent domain proceedings in its court in the first instance. And, such situations are not likely of repetition and then only in instances where there is a clear connection between the after-initiated state court action and the need to vindicate the federal constitutional right. As the district court properly determined, "It would be difficult, even hypotethically, to construct a situation in which there is a closer relationship between the Article 78 proceedings and the implementation of federal civil rights remedial order than is present here." 43a.

Petitioner asserts that the All Writs Act cannot be the basis for removal. In *Pennsylvania Bureau of Corrections*

v. United States Marshals Service., 474 U.S. 34, 43 (1985), this Court held that the All Writs Act may be invoked "to fashion extraordinary remedies when the need arises." The All Writs Act may inform the exercise of federal authority even where another federal statute ordinarily would govern the issue. *United States Alkali Export Ass'n. v. United States,* 325 U.S. 196, 201-204 (1945). Such an exercise is particularly necessary and appropriate to avoid the frustration of previously entered federal court orders. *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977).

The Raceway never confronts, either directly or indirectly, the reality that failure to remove would clearly have held out the real prospect for frustration of and delay in implementation of critical district court orders. This central fact distinguishes this situation from those in which federal courts have sought to exercise jurisdiction over matters neither within their jurisdiction nor so intimately related to a matter so characterized. Indeed, contrary to petitioner's suggestion (Brief at 13), there is simply no conflict between the decision of the Second Circuit and that of any other Court of Appeals. Not, more critically, does the Court of Appeals' dicision conflict with any precedent of this Court.

b. THE DECISION BELOW IS NOT CONTRARY TO STATE LAW

As explained above, the district court entered the Consent Decree after considerable scrutiny and study of all affected sites, including petitioner's. The Raceway suggests that after the entry of the Consent Decree, which obligated it to acquire the property in question, the City should have scheduled a hearing to determine, among

other things, "the general effect of the proposed project on the environment and residents of the locality" and "such other factors as it considers relevant."

This is simply a frivolous proposition which is unworthy of review. Accepting the Consent Decree, the district court determined that the sites included therein were appropriate locations for the 200 units of public housing.[8] It was not then for Yonkers to initiate a series of public hearings under the Eminent Domain Procedures Law to revisit that issue for each site in question, in whatever semantic guise. Such a process would have implied that, on the basis of any such hearings, the City could have disobeyed the requirements of the Consent Decree. But, this is absurd and only points out that by definition, the federal adjudicatory process settled the propriety of the sites in question for purposes of EDPL sec. 204. As the district court held, the review process described above served as "substantial compliance" with the purposes of the State notice and review provisions" (53a) and further local proceedings would prevent the expeditions vindication of federal rights. *Id.*

The Court of Appeals agreed, holding that "given the undisputed public purpose inherent in the implementation of the Housing Remedy Order and the nature and extent of the review process, we are convinced that there was a

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8. Petitioner claims that "there was no proof in the record" that preliminary federal environmental studies had been performed sufficient to satisfy the requirements of New York law." While this statement may be true of the record it placed before the district court, the record in *United States v. City of Yonkers* contains, as petitioners know, HUD analysis showing the suitability of this and the other sites in question.

valid determination that the proposed condemnations would be in the public interest as required under Article 2 of the EDPL." 23a.[9]

Alternatively, the Court of Appeals properly affirmed the district court's rejection of petitioner's suggestions (a) that the emergency exception clause to the EDPL applies only to physical emergencies, 21a, and (b) that Yonkers' responsibility for prior delays was relevant to the existence in 1988 of an emergency requiring expeditious action to further implementation of the Consent Decree, 21a-22a, citing *Gerges v. Koch*, 62 N.Y. 2d 84 (1984).

Finally, the courts below properly ruled that the State Environmental Quality Review Act, Environmental Conservation Law (ECL), sec. 8-0101 *et seq.* was satisfied by HUD's review process under the National Environmental Policy Act (NEPA), 42 U.S.C. sec. 432 et seq. In addition, the proposed condemnations are exempt from SEQRA since they are being undertaken "pursuant to a judgment or order" entered by "any court". 6 NYCRR sec. 617.2(q) (1), (5). Petitioner's suggestion that this exception applies only to situations initiated to force a party to comply with the environmental review statute finds no support in either the wording of the regulation or in common sense.

Finally, with regard to the alleged inappropriateness of the Raceway site or petitioner's alleged need for that parking lot, the district court determined "that there has

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9. Petitioner focuses on the reviews done or not done by Yonkers. Both courts below more properly focused on whether the process of selecting the sites in the January 1988 Consent Decree included substantial consideration of the matters deemed relevant by state law. On this issue, the record is clear and the petitioner is silent.

been no documentation of [the] claim made in oral argument that the parking lot site is essential to the operation of the Raceway. This court rejects such claim." 56a.

III. CONCLUSION

Because the petition raises no issues worthy of review and no compelling reason for review has ben supplied, we pray that this court deny the petition for a writ of certiorari.

Respectfully submitted,

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